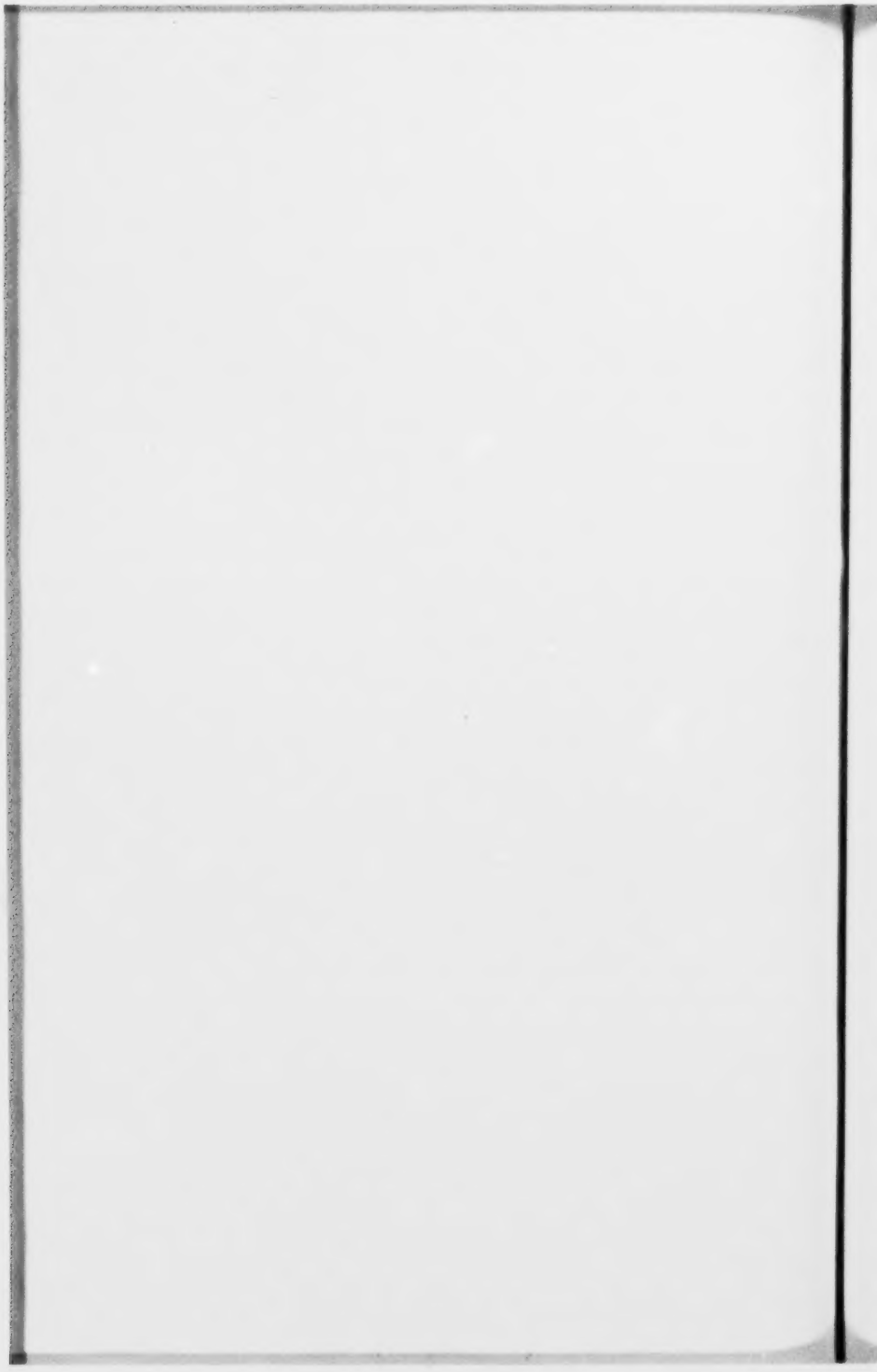

SUPREME COURT OF THE UNITED STATES

No.

CRAB ORCHARD IMPROVEMENT COMPANY,
a corporation, Petitioner,

vs.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation, Respondent.

Brief in Support of Petition for Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

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1. OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit in this case is reported in Crab Orchard Improvement Company vs. Chesapeake and Ohio Railway Company in 115 Fed. 2nd 277. The opinion of the District Court in this case is reported in Crab Orchard Improvement Company vs. Chesapeake and Ohio Railway Company in 33 Fed. Sup. 580.

2. GROUNDS FOR JURISDICTION.

The Judgment of the Court below was entered November 12, 1940.

The jurisdiction of the United States District Court was originally invoked by the appellee under the statute relating to diversity of citizenship. Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is invoked under Act of March 3, 1891 as amended, Judicial Code, Sec. 240 amended, 8 F. C. A. Title 28, Sec. 347. Also Supreme Court Rule 38 Paragraph 5 (b). Particularly is jurisdiction invoked because of the decision of the Circuit Court of Appeals for the Fourth Circuit in this case is believed to be in conflict with the decision of the Circuit Court of Appeals for the 10th Circuit on the same matter. See Staples vs. Central Surety and Insurance Corporation 1932, CCA 10th Circuit, 62 Fed. 2nd 650.

3. STATEMENT OF THE CASE.

The appellant, Crab Orchard Improvement Company, later referred to as Improvement Company, employs a large number of men in the operation of its coal mine at Eccles, West Virginia. It is a subscriber to the West Virginia Workmen's Compensation Fund. The appellee, Chesapeake and Ohio Railway Company, referred to hereafter as Railway Company, operates a railroad near the Improvement Company's coal mine and under its coal tipple where coal from the mine is dumped and loaded into railroad cars on the Railway Company's track placed there for that purpose. Andy Henry was Improvement Company's employee at its coal tipple and in the course of his duty it was necessary for him to walk back and forth across the railway tracks. On December 9, 1936 one of the Railway Company's engines pushing a load of coal cars along the track at said coal tipple was so negligently operated by the employees of the Railway Company that it struck Andy Henry as he was crossing the tracks in the performance of his duties for the Improvement Company, killing him instantly. The Improvement Company was in

no way at fault in respect to the accident, but being a subscriber to the West Virginia Workmen's Compensation Fund was compelled by operation of the West Virginia law to pay $4000 into the Workmen's Compensation Fund as result of Henry's death and to pay an increased rate in premiums to said fund, which, up to the time of the filing of this action, amounted to $11,000. By this action the appellant Improvement Company seeks to recover from the appellee Railway Company the amount which it has been compelled to pay as result of the Railway Company's wrongful act in killing Andy Henry.

The action was originally brought December 6, 1937 in the Circuit Court of Raleigh County, West Virginia and thereafter removed by the Appellee to the District Court of the United States for the Southern District of West Virginia at Bluefield on the grounds of diversity of citizenship. There was a demurrer to, and later a motion to dismiss the plaintiff's declaration. The District Court sustained said demurrer and motion and dismissed the action by final judgment entered therein on June 18, 1940. No proof was taken and there was no trial on the merits. The Appellant Improvement Company appealed the case to the Circuit Court of Appeals for the Fourth Circuit at Richmond and that Court rendered a decision affirming the judgment of the District Court. The Appellant Improvement Company now asks for a writ of certiorari to review the judgment of the Circuit Court of Appeals.

4. SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the appellant was not entitled to maintain this action against the appellee on the basis of quasi-contractual indemnity.

2. In holding that the appellant does not have a

common law right of subrogation against the third party tort-feasor.

3. In holding that the third party tort-feasor by his negligence in killing of the employee had breached no legal duty owed to the employer.

4. In rendering a judgment which is believed to be in conflict with the decision of the Circuit Court of Appeals for the 10th Circuit upon the same matter.

5. In giving a judgment for the appellee and affirming the decision of the District Court.

5. ARGUMENT.

FIRST: When Andy Henry was killed in the course of his employment the appellant was required by the West Virginia Workmen's Compensation Act and the decisions of the West Virginia Supreme Court thereunder, to pay a lump sum into the Compensation fund and to submit to an increased rate of premiums.

West Virginia Code, Chapter 23, Article 2, Section 4.

Peerless Coal Company v. *Compensation Commissioner*, 113 W. Va. 6; 166 S.E. 529.

This point is conceded by both parties and for that reason the West Virginia statute is not copied.

SECOND: An action by the appellant to recover the amount it has been compelled to pay may be maintained upon the common law principles of indemnity and subrogation entirely independent of the provisions of the West Virginia Workmen's Compensation Act.

Staples v. *Central Surety & Insurance Corporation*, (1932, CCA 10th Circuit) 62 Fed. 2nd 650.

Travelers Insurance Company v. *Great Lakes Engineering Company*, 107 CCA 20; 184 Fed. 426; 36 LRA (N.S.) 60.

George A. Fuller Company v. *Otis Elevator Company*, 254 U. S. 489; 38 S. Ct. 180; 62 L. Ed. 422.

Dayton Power & Light Company v. *Westinghouse Electric & Manufacturing Company*, 287 Fed. 439; 37 ALR 849.

Washington Gas Light Company v. *District of Columbia*, 161 U. S. 316; 16 S. Ct. 546; 40 L. Ed. 712.

Pennsylvania Steel Company v. *Washington & Berkley Bridge Company* (Dist. Ct. N. D. W. Va.); 194 Fed. 1011.

Foster & Glassell Company v. *Knight Brothers* (La. 1922) 93 So. 913.

27 *Am. Jr.* 467, Indemnity Section 18.

In the case of *Staples* v. *Central Surety & Insurance Corporation, supra,* which we respectfully submit, is directly in point, an employee of the plaintiff was injured in the course of his employment by the negligence of a third party. The Oklahoma Compensation Act contained no provision for subrogation in such cases. Compensation was awarded the injured party and paid by Central Surety & Insurance Corporation, the insurer. In a direct action against the negligent third party the Circuit Court of Appeals for the 10th Circuit held that plaintiff was entitled to recover the amount paid from the third party causing the injury to the employee entirely independent of any provisions of the Compensation Act. The Court said in its opinion on pages 652 and 653:

"Appellee, having paid the award pursuant to its contract of insurance with Bush, is subrogated to

the rights of Bush against Appellants, and this right of subrogation does not rest upon any relationship of contract or privity between the insurer and the insured.

"It is a well recognized rule, supported by a great weight of authority, that, where one has been subjected to liability, and has suffered a loss thereby, on account of the negligence or wrongful act of another, the one has a right of action against the other for indemnity.

"Upon this settled principle, it is clear that Bush, having been subjected to liability to his employee, Gaugler, under the Compensation Law, as a result of the negligence of appellants, had a cause of action in his own right, for indemnity against appellants *at common law entirely independent of any provisions of the Compensation law.*" (emphasis ours)

In the case of *Foster & Glassell Company* v. *Knight Brothers, supra,* it is clearly shown that an employer may have two separate causes of action; (1) a cause of action based on a subrogation provision in a Workmen's Compensation Act; and (2) a cause of action for indemnity at common law. The Louisiana Workmen's Compensation Act contained a provision subrogating the employer to the rights of injured employees, as against a third party whose negligence caused the injury. Plaintiff was the employer of one Morris who was injured by the alleged negligence of defendant on November 27, 1917. Plaintiff was compelled to pay $537.40 as compensation to Morris for his injuries. This payment was made on August 3, 1920. On November 13, 1920 plaintiff brought its action against the defendant to recover $650.00 for Morris' injuries, including the amount it had been compelled to pay Morris as Compensation. The statute of limitations on personal injury actions in Louisiana was one year. The defendant filed its plea of limitations. The Court held that the plaintiff had two causes of action; first, that based on the sub-

rogation provision of the Workmen's Compensation Act, which placed the plaintiff in the position of Morris, the injured employee; second, for indemnity to be reimbursed for money it had been compelled to pay on account of the fault of defendant. As to the first cause of action, it was barred by limitations because under the subrogation statute plaintiff had no greater right than Morris and since it had been more than a year since Morris' injury plaintiff could not now maintain the action under the statutory provision. But plaintiff was allowed to maintain the action on the common law principle of indemnity since one year had not elapsed since plaintiff had made the compensation payments required of it by law. The cause of action based on the subrogation statute was barred by limitations but the cause of action based upon the common law principle of indemnity was maintainable. The Court said the two causes of action were properly combined.

The Court, in the opinion on pages 914 and 915 said:

> "But plaintiff had two causes of action under the law, the one for and on behalf of Morris, and the other for indemnification, as upon an implied or quasi contract to be reimbursed for money which it was compelled to pay on account of the fault of defendant.
>
> "Where two persons are liable to another for injuries received, the one because of fault or negligence, and the other merely because of statutory requirements or duty, but without actual fault, the latter, upon payment for the injury so inflicted, may recover of the tort-feasor as indemnity the sum so paid as upon an implied or quasi contract.
>
> "This right of action (statutory subrogation) merely supplements that recognized by the jurisprudence. *** *** *** Under the subrogation, that remedy, as well as the cause of action, whether brought in the name of the employer or employe, is prescribed within one year from the date of the injury. On the

other hand, when, at the end of the litigation the employer paid the employe the sums which it was compelled to under the statute, at that time, and not until then, a cause of action arose in its favor, *independent of the statute* (emphasis ours) as on an implied contract for indemnification at the hands of the defendant, if the injury was caused by the latter's negligence. As to this latter cause of action the judgment of plaintiff (the employe) became final on July 13, it was paid on August 3, and this suit was filed on November 13, 1920, so that the year had not elapsed.

"Our conclusion therefore is that, in so far as the demand exceeds the sum alleged to have been paid by plaintiff to its employe the plea of prescription was properly sustained; but as to the claim of $537.40, as for money paid because of the fault of defendant, it should have been overruled."

In an annotation in 40 *LRA* (N.S.) at page 1148 the author summarizes the rule as follows:

"The ground of the action is that the defendant has by his own unauthorized act, exposed the plaintiff to a liability, and it is immaterial whether such liability is imposed by force of a statute or by the rule of the common law, for in either case the plaintiff is held liable by inference of law, and not by reason of his active participation in the action which was the occasion of the injury."

THIRD: The right to maintain the action is not affected by the provisions of the West Virginia Wrongful Death Statute.

Traveler's Insurance Company v. *Great Lakes Engineering Company*, 107 CCA 20; 184 Fed. 426; 36 LRA (N.S.) 60.

Aetna Life Insurance Company v. *Moses*, 287 US 530; 77 L. Ed. 477.

In the case of *Traveler's Insurance Company* v. *Great Lakes Engineering Company, supra,* it is said:

> "The right of the employer ********** is not founded on the death, but upon the loss caused by the recovery against the employer, and an action therefor is therefore not defeated by the fact that the employer is not within the statutory provision as to who may maintain an action for wrongful death."

In the case of *Aetna Life Insurance Company* vs. *Moses, supra,* it is stated in point 4 of the syllabus:

> "Subrogation of a workmen's compensation insurer to the right of the employer to recover damages against a third person because of the death of an employee for which compensation has been awarded, is not precluded by the non-assignability under the death statute and the common law, of the cause of action vested in the personal representative of the deceased employee."

FOURTH: The right to maintain the action does not depend upon assignability or any statutory provision for subrogation.

Staples v. *Central Surety & Insurance Corporation,* (1932 CCA 10th Ct); 62 Fed. 2nd 650.

Foster & Glassell Company v. *Knight Brothers* (La. 1922) 93 So. 913

Fidelity & Casualty Company v. *St. Paul Gas Light Company* (Minn. 1922) 188

In the case of *Fidelity & Casualty Company* v. *St. Paul Gas Light Company, supra,* it is said that the subrogation provision in the Compensation acts of some states "are no doubt merely declaratory of the common law rule of subrogation available to the employer without an act of the Legislature."

It is submitted that a subrogation provision in the

West Virginia Workmen's Compensation Act is not necessary to the maintenance of this action. The common law principles of indemnity and subrogation have always been applied by courts when one has been compelled to pay out money or subjected to legal liability on account of the wrongful act of another. The various Federal Courts including the Supreme Court has applied this principle both before and after the enactment of the various Workmen's Compensation Acts. It cannot be said that the adoption of the West Virginia Workmen's Compensation Act destroyed these principles of indemnity and subrogation or deprived plaintiff of its rights under them. If the plaintiff in this case had been compelled to pay damages directly to Henry for his injuries, due to defendant's negligence, and there had been no Compensation Act in force at the time, it could not be said that the Railway Company is not liable over to the plaintiff for what it was compelled to pay. Can it be said then that the adoption of the Workmen's Compensation Act in West Virginia deprived the plaintiff of its common law right of indemnity? There is no provision in the Compensation Act depriving plaintiff of this common law right and we submit that it cannot be so interpreted.

The fact that the employee, Henry, or his personal representative may assert two distinct claims is not material to the issue involved here. The Circuit Court of Appeals for the 6th Circuit disposed of that argument in *Dayton Power & Light Company* vs. *Westinghouse Electric & Manufacturing Company, supra,* on page 442, of the opinion:

> "It is thus not, in our opinion, important that under Ohio decisions an employee injured in the course of his employment by the wrongful act of a third person may maintain an action against such third person, unaffected either in amount of recovery or otherwise by the fact that he has received compensation under the Workmen's Compensation Act. We

think it immaterial to the issues before us whether or not plaintiff's employee himself has a right of recovery against the defendant on the ground of the latter's negligence."

It is respectfully submitted that the Railway Company under the circumstances alleged in the declaration owed a duty to the plaintiff. That duty was to use reasonable care not to injure plaintiff's employees, and thus compel the plaintiff by operation of the statute to pay money into the Compensation Fund. Under the circumstances the Railway Company owed the plaintiff the same duty not to negligently injure its employees as it did, not to negligently damage or destroy plaintiff's property. The legal effect is the same.

CONCLUSION

In conclusion, to the end, therefore, that justice may be done, it is respectfully submitted that this Court should grant a writ of certiorari to the judgment of the Circuit Court of Appeals for the Fourth Circuit, and that said judgment should be reviewed and reversed.

Respectfully submitted,

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